SMU | DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 21 | Issue 4 Article 7

1967

# The Hot Cargo Agreement in Labor-Management Contracts - From Conway's Express to National Woodwork

George E. Seary Jr.

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation

George E. Seary Jr., *The Hot Cargo Agreement in Labor-Management Contracts - From Conway's Express to National Woodwork*, 21 Sw L.J. 779 (1967)
https://scholar.smu.edu/smulr/vol21/iss4/7

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

# COMMENTS

## THE HOT CARGO AGREEMENT IN LABOR-MANAGEMENT CONTRACTS — FROM CONWAY'S EXPRESS TO NATIONAL WOODWORK

*by George E. Seay, Jr.*

Section 8(b)(4)(A) of the Taft-Hartley Act,[1] passed in 1947, was designed to outlaw secondary boycotts. Prior to the Taft-Hartley Act, boycotts had long been used by unions to aid each other during labor disputes and strikes. The most common technique employed was to strike plant *A* which was handling or receiving the goods produced by plant *B* when the latter was involved in a labor dispute, a strike, or was classed as unfair by the union. Since the labor dispute at the producing plant did not involve the plant *A* employees, their strike was a secondary boycott or sympathy strike designed to exert extra pressure on the management of plant *B*.[2] Section 8(b)(4)(A)[3] prohibited this type of strike by declaring it unlawful for a union to induce or encourage employees to engage in a strike or a concerted refusal in the course of their employment to handle products, for the purpose of forcing one employer to stop doing business with another employer.

In order to avoid the effects of this section, unions began to include "hot cargo" clauses in their collective bargaining agreements with management. The typical clause stipulates that the employer will not handle or use goods which are not union made or which are manufactured by a company considered to be unfair by the union. The employer also agrees not to require employees to use or handle these goods.[4] With the use of hot cargo clauses by unions came the question as to whether the agreement, when put into practice, was, in effect, a secondary boycott which is prohibited by section 8(b)(4)(A); or, whether the agreement containing the clause was a valid defense to a secondary boycott charge.

---

[1] Labor Management Relations Act, 29 U.S.C. § 158(b)(4)(A) (1947), *as amended*, 29 U.S.C. § 158(b)(4)(B) (1964). Section 8(b)(4)(A) became 8(b)(4)(B) when the Act was amended in the Labor-Management Reporting and Disclosure Act, 73 Stat. 543 (1959), 29 U.S.C. §§ 151-68 (1964).

[2] *See* Note, *Hot Cargo Clauses as a Defense to Union-Induced Secondary Boycotts*, 61 W. VA. L. REV. 118 (1959) for a more detailed discussion of this effect.

[3] Section 8(b)(4)(A) when enacted stated:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . .
>
> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . ."

29 U.S.C. § 158(b)(4)(A) (1947), *as amended*, 29 U.S.C. § 158(b)(4)(B) (1964).

[4] A typical hot cargo clause might read: "Employees have the right to refuse to handle material which the company purchases from any supplier whose employees are on strike because of a labor dispute." *See* Note, *supra* note 2, at 120.

As justification for the use of the hot cargo clause the argument was made that since the employer consented to the boycotting of the goods, the section 8(b)(4)(A) element of "forcing or requiring"[5] an employer to discontinue his business with other persons was absent. Proponents of this view also argued that unions could legally persuade the *employer* to engage in a secondary boycott.[6]

Opponents of hot cargo agreements argued that the intention of Congress in enacting section 8(b)(4)(A) was not only to protect the secondary employer, but also the general public who would be affected by the boycott.[7] If Congress' purpose was to protect the public, then an employer could not contractually waive the statutory protection, for to do so would deprive the public of its statutory safeguard without its consent.[8] Therefore, it was argued that the hot cargo clause was outlawed by the broad legislative purpose of section 8(b)(4)(A).[9]

## I. The Hot Cargo Agreement Before the NLRB

The first important case to come before the National Labor Relations Board was *Local 294, Teamsters (Conway's Express)* in 1949.[10] In *Conway* three companies[11] entered a contract with the Teamsters Union whereby the union reserved the right to refuse to handle the goods of any employer engaged in a labor dispute. The employees of each of the three companies were persuaded to discontinue handling Conway's freight when the Conway employees went on strike. Each of the three employers, in accordance with his contract, agreed and abided by the employees' decision to refuse to handle the Conway "hot cargo." Conway took the case before the National Labor Relations Board and claimed that this action was prohibited under section 8(b)(4)(A)[12] of the Taft-Hartley Act and was an unfair labor practice by the unions that represented the secondary employees. The Board, following the argument advanced by the proponents of the clause, held that the union action did not constitute an unfair labor practice because the secondary employers were not "forced or required"[13] to cease doing business with the primary employer within the meaning of section 8(b)(4)(A). The Board reasoned that since section 8(b)(4)(A) prohibited forcing or requiring any person to cease dealing with another person, it could not be used to prohibit this type of agreement because the employer was never "forced or required," but consented to the action. The Board also concluded that section 8(b)(4)(A) only

[5] 29 U.S.C. § 158(b)(4)(B) (1964). Since the original § 8(b)(4)(A) has now become § 8(b)(4)(B) the footnotes will refer to the section in its present form of citation.

[6] This must be assumed since § 8(b)(4)(A) is silent on the matter of a union inducing employers as opposed to employees. *See* Local 294, Teamsters (Conway's Express), 87 N.L.R.B. 972 (1949).

[7] The boycotts exert a harmful effect on the economy due to their disruptive effect on the flow of goods in commerce.

[8] *See* 22 NLRB Ann. Rep. 148 (1957).

[9] *See* Note, *supra* note 2.

[10] 87 N.L.R.B. 972 (1949).

[11] Palmer Lines, Central Warehouse, and Oppenheimer were the companies involved.

[12] 29 U.S.C. § 158(b)(4)(B) (1964).

[13] *Id.*

applied to inducement of employees and since the demand for the boycott was made to the secondary employers, this element was clearly lacking. The Board stated:

> It is evident from these facts that the three secondary employers, in effect, consented in advance to boycott Conway's. As they consented, their employees' failure to deliver freight to or accept freight from Conway trucks was not in the literal sense a 'strike' or 'refusal' to work, nor was any such concerted *insubordination* contemplated by the Respondent when it caused the employees to exercise their contractual privilege. In the circumstances, Section 8(b)(4)(A) cannot apply, unless we accept the General Counsel's argument that the 'hot cargo' contracts were repugnant to the policy of the amended Act and therefore invalid after the effective date of the 1947 amendments. But we find no merit in this argument.[14]

One member of the Board dissented, contending that the Act forbids secondary boycott activity on the part of unions, and therefore, if a clause in a contract attempts to authorize this activity, it is inconsistent with the public policies of the Act.[15]

In 1953, four years after the Board's decision in *Conway's Express*, the question of hot cargo agreements again came before the Board in *Chauffeurs Local 135 (Pittsburgh Plate Glass Co.)*.[16] In *Pittsburgh Plate Glass* the Board in effect reaffirmed its earlier decision on hot cargo agreements, although here the Board was presented with the additional problem of inducement and encouragement of the secondary employees by the union. The Board held that if an employer and a union agree to include a hot cargo clause in their collective bargaining agreement, section 8(b)(4)(A) is not applicable because the secondary employees' failure to handle the goods is not a strike or concerted refusal under the section. The Board found that since the agreement exempted employees from performing their required duties in regard to "unfair goods" these duties were not "in the course of their employment" as expressly required by the section.[17]

After the Board rulings in *Conway's Express* and *Pittsburgh Plate Glass* and acquiescence by the Second Circuit,[18] it appeared that the controversy over hot cargo agreements had been conclusively determined. If a union could persuade an employer to include a hot cargo clause in their collective bargaining agreement, the union would then have potential freedom in the area of secondary boycotts.

Although the matter seemed settled, employers still continued to file charges of illegal secondary activity in an attempt to have the Board reconsider the issues. Shortly after *Pittsburgh Plate Glass* the controversy was reopened in *Local 608, Teamsters (McAllister Transfer, Inc.)*.[19] The McAllister Transfer Corporation, an interstate motor carrier, filed charges against the Teamsters, claiming that the union was violating the Act by engaging in secondary activities. The controversy arose when McAllister

[14] 87 N.L.R.B. at 982.
[15] 87 N.L.R.B. at 988, 995 (dissent of Member Reynolds).
[16] 105 N.L.R.B. 740 (1953).
[17] *Id.*
[18] Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).
[19] 110 N.L.R.B. 1769 (1954).

refused to recognize the Teamsters as their employees' bargaining agent. The Teamsters ordered the employees of other interstate common carriers to discontinue handling McAllister's freight upon arrival at the docks. Although the employees of the secondary carriers were under a collective bargaining contract that included a hot cargo clause, the secondary employers, disregarding the contract, directed their employees to handle the McAllister freight shipments. The employees refused and as a result the movement of freight from McAllister was suspended.

The *McAllister* case came before the Board in 1959 and was ultimately decided by Board Chairman Farmer when the other four members deadlocked. Two Board members believed that section 8(b)(4)(A) prohibited all secondary boycotts and was enacted for the protection of the primary employer and the public as well as the secondary employers. The other two members of the Board felt that since the employers had consented in advance to the boycott there was no strike or refusal to handle goods under the statute. In breaking the deadlock Farmer determined that section 8(b)(4)(A) was enacted solely for the protection of the secondary employers against involvement in labor disputes outside of their company.[20] Therefore, if the secondary employer wished to respect the hot cargo clause and consented to his employee's refusal to handle the disfavored goods, there was no strike or refusal within the meaning of the statute. However, under Farmer's rationale if the employer decided not to honor the hot cargo clause and ordered his employees to handle the unfair goods, any union-induced work stoppage was violative of section 8(b)(4)(A) because the essential element of defiance or insubordination was present. Under this reasoning the important element was whether the employer chose to honor the hot cargo clause when the union and the employees wished to invoke it and thereby participate in a concerted refusal to handle the hot cargo.[21]

Several years later the problem of hot cargo clauses again came to the Board's attention in *Local 1976, Carpenters (Sand Door & Plywood Co.)*[22] and *General Drivers Local 886 (American Iron & Machine Works Co.)*.[23] The Board, following the *McAllister* case, again held that the hot cargo clauses did not remove secondary work stoppages induced by unions from the reach of section 8(b)(4)(A) unless honored by the employer. The Board also held that since the statute did expressly prohibit union inducement of employees to engage in work stoppages, a union was barred from appealing directly to the employees, regardless of the approval or nonapproval of the employer. However, the employer might instruct his employees to cease handling the disfavored goods.[24]

In 1958 the question again came before the Board in *Truck Drivers*

[20] *Id.* at 1777.

[21] *See* Fenton, *Hot Cargo and the Taft-Hartley Act*, 31 ROCKY MT. L. REV. 153, 155 (1958).

[22] 113 N.L.R.B. 1210 (1955).

[23] 115 N.L.R.B. 800 (1956).

[24] A third member of the three-man majority held that the Union had committed an unfair labor practice on the ground that hot cargo agreements are invalid as contrary to public policy and therefore cannot be a defense to conduct otherwise proscribed by the statute. Local 1976, Carpenters (Sand Door & Plywood Co.), 113 N.L.R.B. 1210, 1219 (1955).

*Local 728 (Genuine Parts Co.)*,[25] which involved a secondary employer who was a common carrier subject to the Interstate Commerce Act and who had entered into a hot cargo agreement with a union. The Board reversed its earlier decisions and held that the clause was not a defense to secondary boycott charges against the union. Two members of the majority based their decision on the theory that a common carrier cannot agree to boycott a shipper and remain true to its obligation under the Interstate Commerce Act which requires service to the public without discrimination.[26] The third member of the majority based his decision[27] on the belief that hot cargo clauses were invalid as against public policy and therefore could not be used as a defense to prosecution for activity prohibited by the statute.[28]

Just as there had been a conflict in the decisions of the Board, a similar disagreement existed among the circuit courts of appeals that dealt with the hot cargo issue. Between 1952 and 1958 the Court of Appeals for the District of Columbia[29] and the Second Circuit[30] adopted the Board's position in *Conway's Express* and held the agreements a valid defense to secondary boycott charges. On the other hand, the Ninth Circuit affirmed the Board's decisions in *American Iron* and *Sand Door*,[31] that a secondary boycott pursuant to a hot cargo agreement was an unfair labor practice. Finally the issue came before the Supreme Court after eight years of litigation before the Board and the Circuit Courts of Appeals. The case was *Local 1976, Carpenters (Sand Door & Plywood Co.)*.[32]

## II. Sand Door—The Requirement of Employer Reaffirmance

The *Sand Door* case arose out of a labor dispute between the carpenters' union and an employer engaged in the building construction trade. The Sand Door and Plywood Company was exclusive distributor of Paine Lumber Company doors. Havstad and Jensen, general contractors employed to construct a hospital in Los Angeles, were at the time of the dispute parties to a contract with the United Brotherhood of Carpenters and Joiners of America. This agreement contained a hot cargo provision to the effect that "workmen shall not be required to handle non-union

[25] 119 N.L.R.B. 399 (1957).

[26] *Id.* at 404.

[27] *Id.* at 425.

[28] The Interstate Commerce Commission also was faced with the hot cargo clause in Galveston Truck Lines Corp. v. Ada Motor Lines, 73 I.C.C. 617 (1958), in which a group of common carriers refused to take interline traffic sent to them by the complainant who was involved in a labor dispute with the Teamsters. The carriers' defense was based on their labor contracts which granted their employees the right to refrain from handling unfair goods or the goods of an unfair company. The ICC held that it was without the power to rule on the legality of hot cargo agreements since these agreements affect labor relations between employers and employees, a subject matter reserved to the National Labor Relations Board. The ICC did hold that a common carrier cannot bargain away its statutory duty owed to the public to provide responsible service and facilities for the transportation of goods in interstate commerce.

[29] Local 1886, General Drivers v. NLRB, 247 F.2d 71 (D.C. Cir. 1957).

[30] Milk Drivers Union v. NLRB, 245 F.2d 817 (2d Cir. 1957); Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952).

[31] NLRB v. Local 1976, Carpenters (Sand Door & Plywood Co.), 241 F.2d 147 (9th Cir. 1957).

[32] Local 1976, Carpenters (Sand Door & Plywood Co.) v. NLRB, 357 U.S. 93 (1958). This case was consolidated with NLRB v. Local 886, General Drivers Union, and Local 850, International Ass'n of Machinists v. NLRB, which were two other cases involving the same issue.

material."[33] In August of 1954 doors manufactured by Paine and purchased by the Sand Door Company were delivered to the hospital construction area. The union notified the contractors, Havstad and Jensen, that the doors were manufactured by a non-union company (Paine) and therefore could not be hung. Havstad and Jensen complied with this request and negotiations commenced between Sand Door and the union. Upon failing to reach an agreement which would allow the doors to be hung, Sand Door filed charges with the National Labor Relations Board and a complaint was issued. The Board ruled that the petitioner union had induced and encouraged employees to engage in a concerted refusal to handle Paine's doors for the purpose of forcing Havstad and Jensen to terminate their business relationship with Sand Door which conduct was a violation of section 8(b)(4)(A).[34] The Ninth Circuit Court of Appeals enforced the Board's cease and desist order[35] and the Supreme Court granted certiorari.[36] The question presented to the Court was whether a hot cargo clause constituted a defense under section 8(b)(4)(A) to a union-induced secondary boycott. The union argued that although section 8(b)(4)(A) was enacted to protect neutrals from becoming involuntarily involved in labor disputes, the statute should not extend to a party who has voluntarily agreed to the strike, particularly when that employer does nothing at the time of the boycott to repudiate the collective bargaining agreement. The Court held that while there was no broad prohibition of these agreements in section 8(b)(4)(A)[37] compliance or non-compliance with the hot cargo clause was a choice for the employer to make at the time the boycott arose and, therefore, the employer could not make a binding agreement to boycott in advance. This pressure-free choice must be available to the contracting employer as a matter of federal policy, regardless of a prior agreement between the parties.[38] Thus, the Supreme Court in the *Sand Door* decision modified the *Conway* doctrine by requiring reaffirmance on the part of the employer at the time of the dispute. Hot cargo clauses were not outlawed per se by the ruling which stated that:

> There is nothing in the legislative history to show that Congress directly considered the relation between hot cargo provisions and the prohibitions of 8(b)(4)(A). Nevertheless, it seems most probable that the freedom of choice for the employer contemplated by 8(b)(4)(A) is a freedom of choice at the time the question whether to boycott or not arises in a concrete situation calling for the exercise of judgment on a particular matter of labor and business policy. Such a choice, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—must as a matter of federal policy be available to the secondary employer notwithstanding any private agreement entered into between the parties.[39]

[33] *Id.* at 95.
[34] 113 N.L.R.B. 1210 (1955).
[35] 241 F.2d 147 (9th Cir. 1957).
[36] 355 U.S. 808 (1957).
[37] 29 U.S.C. § 158(b)(4)(B) (1964).
[38] 357 U.S. at 105.
[39] *Id.*

The status of the hot cargo agreement after the *Sand Door* decision seemed to have been defined. A secondary employer could still voluntarily engage in a boycott for his own business purposes and a union could still approach an employer and attempt to persuade him to engage in a boycott, but the union was prohibited from inducing the employees to refuse to handle the goods. *Sand Door* thus rejected the idea that the congressional purpose in enacting section 8(b)(4)(A) was to give the primary employer or the general public full protection against a secondary boycott.[40]

## III. Section 8(e) of the Landrum-Griffin Act—Congressional Response to Sand Door

Under the Taft-Hartley Act of 1947 the NLRB and federal court decisions on hot cargo agreements revealed several different approaches. These ranged from the liberal approach,[41] validating the agreement, to the strict view[42] that a hot cargo clause was illegal per se; to the compromise position,[43] approved by the Supreme Court in the *Sand Door* case, that the clause was valid, but that it could not immunize from section 8(b)(4)(A) a strike, or inducement of employees to engage in a work stoppage, unless voluntarily agreed to by the employer.[44]

Congressional response to this situation was section 8(e)[45] of the Landrum-Griffin Act[46] which provides that a hot cargo agreement is illegal per se and unenforceable. The creation of such an agreement is made an unfair labor practice[47] and a union is forbidden to use methods proscribed in section 8(b)(4)(A) to force an employer to enter into a hot cargo agreement.[48] Under section 8(e) it is an unfair labor practice:

> for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void . . . .[49]

However, section 8(e) of the Landrum-Griffin Act[50] specifically excludes some industries from the blanket prohibition against hot cargo agreements.[51] For example, section 8(e) declares:

---

[40] For a discussion of some of the problems left open, see Fenton, *supra* note 21, at 161.

[41] *See* Comment, *The Landrum-Griffin Amendments: Labor's Use of the Secondary Boycott*, 45 Cornell L.Q. 724, 739 (1960).

[42] *Id.*

[43] *Id.*

[44] Local 1976, Carpenters (Sand Door & Plywood Co.) v. NLRB, 357 U.S. 93 (1958).

[45] 29 U.S.C. § 158(e) [hereinafter referred to as section 8(e)].

[46] 73 Stat. 543 (1959), 29 U.S.C. § 158 (1964).

[47] Section 8(e) is retroactive in effect and therefore hot cargo contracts entered into prior to the amendment are invalidated. *See* Comment, *supra* note 41.

[48] 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4)(A) (1964).

[49] 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (1964).

[50] 29 U.S.C. §§ 151-68 (1964). Under the Landrum-Griffin Act the old § 8(b)(4)(A) became § 8(b)(4)(B) and a new § 8(b)(4)(A) was inserted which made it an unfair labor practice to force an employer to enter into an agreement prohibited by § 8(e).

[51] *See* Farmer, *The Status and Application of the Secondary Boycott and Hot Cargo Provisions*, 48 Geo. L.J. 354 (1959).

> Nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.[52]

The purpose of the exemption[53] was to provide a workable solution to the problem which arises when union men are forced to work alongside non-union men on the same construction project.[54]

The scope of the construction industry exception was a subject of controversy when enacted. The difficulty arose in determining whether it was meant to include work that could be performed at the construction site or only work actually done at the construction site.[55] The disagreement over the phrase "to be done at the site of the construction" arose mainly in regard to "fabrication clauses" in plumbing contracts. This type of clause might provide that the cutting, bending or fitting of pipe shall be done either at the employer's shop or at the job site. Since the fabrication is not actually required at the job site, this type of subcontracting clause would not be protected by the proviso if the "work actually done at the job site" interpretation is accepted. On the other hand, since the work could be done at the job site, the clause would be protected under the "could be performed" interpretation. The Board finally held that this exemption for the construction industry applies only to work actually done at the construction site.[56] It does not apply or extend to work done away from the construction site even though the work could be considered as part of the construction process and could have been done at the construction site.

Section 8(e)'s second proviso grants a similar exception for the garment industry. It states that:

> [F]or the purposes of this subsection (e) and Section 8(b)(4)(A) the terms 'any employer' 'any person engaged in commerce or an industry affecting commerce' and 'any person' when used in relation to the terms 'any other, producer, processor, or manufacturer' 'any other employer' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry.[57]

The secondary activity prohibited by section 8(b)(4)(A) and the contracts or agreements banned by section 8(e) were still considered lawful in three situations within the garment industry. The exemption is limited

[52] 29 U.S.C. § 158(e) (1964).

[53] This situation has been described by Justice Douglas as "A basic protest in trade union history." NLRB v. Denver Bldg. & Trade Council, 341 U.S. 675, 692 (1951).

[54] The exemption can be attributed in part to Justice Douglas' dissent in NLRB v. Denver Bldg. & Trade Council, *id.*

[55] The § 8(e) proviso sanctions contractual arrangements whereby a general contractor agrees that all subcontractors on a construction project will hire union labor. It is relatively clear that under both interpretations contractual arrangements whereby a general contractor agrees to the employment of union labor by all subcontractors on a construction project are allowed. *See* Comment, *supra* note 41, at 751.

[56] Carpenters, Ohio Valley Dist. Council (Cardinal Industries), 136 N.L.R.B. 977 (1962).

[57] 29 U.S.C. § 158(e) (1964).

to persons in the relation of a jobber, manufacturer, contractor, or subcontractor (1) working on the goods of the jobber or manufacturer, (2) working on the premises of the jobber or manufacturer, or (3) performing parts of an integrated process of production in the garment industry.[58]

The purpose behind the garment industry exemption can be understood by looking at the nature of that business. The industry is located in cities with easy access to loft rental space. Garments are marketed by jobbers who buy the piece goods, plan the designs, and finally contract out the required cutting and sewing. The machinery used in the operation is easily transported by the subcontractors from one loft to another. For a long time employees were subjected to low wages and poor working conditions because a jobber who had entered a union contract fixing a fair minimum wage could avoid the contract by sending the cutting and sewing to a hidden sweatshop which did not pay the minimum wage. The union usually could not locate and organize the sewing shop until the work was completed. The jobber would then give the next contract to another shop which was hidden in a different loft. Fair contractors were forced by this sweatshop competition to either cut wages below the union scale or go out of business. The fairminded employers and the union soon learned through experience that the union had to persuade jobbers to agree to refrain from doing business with contractors who had not signed contracts with the union.[59]

The third proviso to section 8(e)[60] declares: "That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."[61] Thus the proviso declares that the section 8(e) restriction on hot cargo agreements is not to be applied to such agreements in the garment industry. These agreements can be enforced through the use of strikes, picketing, or other economic pressures. It is important to note, however, that this exception applies only to the garment industry and has no effect on the construction industry exemption which apparently is still governed by the Supreme Court's reasoning in *Sand Door*.

Clearly, with the enactment of section 8(e) of the Landrum-Griffin Act the future of hot cargo agreements in labor-management contracts appeared unfavorable except in the two excluded industries. The clauses were now illegal when entered into between labor organizations and employers. However, further litigation was to arise concerning the issue of whether certain other kinds of agreements between unions and employers constituted the forbidden hot cargo agreements.

## IV. The Interpretation and Construction of Section 8(e)

The NLRB originally gave section 8(e) a literal and broad interpreta-

[58] Therefore the proviso does not permit a union to use a secondary boycott or execute a hot cargo contract where either the disputing or neutral employer is a retailer or wholesaler. 29 U.S.C. § 158(e) (1964).

[59] *See* 105 Cong. Rec. 15222 (1959) (remarks of Senator Kennedy and Representative Thompson).

[60] *See* § 704(b), 73 Stat. 544 (1959), 29 U.S.C. § 158(e) (1964).

[61] *Id.*

tion in accord with what it believed to be congressional intent. In *Lithographers Local 78 (Employing Lithographers of Greater Miami)*[62] the Board held that in enacting section 8(e) Congress intended to reach every device which amounts to an agreement that the contracting employer will not handle the goods of another employer or cease doing business with another person. This broad interpretation resulted in an "effect" as opposed to an "object" test for determining the validity of a clause.[63] The Board felt that Congress intended that section 8(e) extend not only to contracts which by their intended effect or operation achieve the same result.[64] Thus any agreement authorizing employees to refuse to handle another employer's goods was a hot cargo agreement and prohibited by section 8(e).

In *Orange Belt District Council of Painters v. NLRB*[65] the Court of Appeals for the District of Columbia overruled the Board's test and held that the matter of legality under section 8(e) is whether the clause is addressed to the labor relations of the primary or secondary employer. Thus an "object" test was used. The Court stated:

> We have phrased the test as whether the clauses are 'germane to the economic integrity of the principal work unit' and seek 'to protect and preserve the work and standards (the union) has bargained for'; or instead 'extend beyond the (contracting) employer' and are aimed really at the union's difference with another employer.[66]

The proper test for determining legality was again considered in *Teamsters Local 710 (Wilson & Co.)*,[67] which involved the Meat Packers in Chicago. The packers had agreed over a twenty-year period that deliveries of meat products to customers within the Chicago area would be made using the packers' trucks driven by union employees. During this period, deliveries in the Chicago area originated from plants in Chicago, but when the three major packers, Swift, Armour, and Wilson relocated outside of Chicago, a sharp reduction in employment of the union drivers occurred. Deliveries were increasingly being made by over-the-road drivers originating from the packers' facilities outside of the Chicago area. The union, in an attempt to recover the jobs lost by the local drivers in the Chicago area and to retain those jobs still performed there, proposed that a work allocation clause be included in the bargaining agreement requiring that all deliveries in Chicago, whether from within the city or out of state, be made by local employees covered by the agreement. The Board held that the clause provided for "work acquisition" and not "work

---

[62] 130 N.L.R.B. 968, 976 (1961), *enforced as modified*, 301 F.2d 20 (5th Cir. 1962).

[63] *See* Beins, *Job Security and Subcontracting Bargaining: The Sword and the Shield*, Sw. LEGAL FOUNDATION 1968 INSTITUTE ON LABOR LAW, LABOR LAW PROBLEMS.

[64] *See* Local 107, Highway Truck Drivers (E.A. Gallagher & Sons), 131 N.L.R.B. 925, 930 (1961), *enforced*, 302 F.2d 897 (D.C. Cir. 1962).

[65] 328 F.2d 534 (D.C. Cir. 1964).

[66] *Id.* at 538. *See also* Teamsters Local 413 (Patton Warehouse), 140 N.L.R.B. 1474, 1485 (1963); Teamsters Local 728 (Brown Transport Co.), 140 N.L.R.B. 436 (1963), *consolidated and enforced in part and rev'd in part*, 334 F.2d 539 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 916 (1964).

[67] 143 N.L.R.B. 1221 (1963), *enforced in part, rev'd in part, and remanded in part*, 335 F.2d 709 (D.C. Cir. 1964).

preservation" and was secondary in nature.[68] However, the Court of Appeals for the District of Columbia overruled the Board and held that "delivery in the Chicago area irrespective of origin of the shipment, is work fairly claimable by the union."[69] The court went on to say that this attempt by the union to maintain and regain the local delivery jobs was a typical primary activity and was valid under section 8(e).[70] The court upheld the union provision on the basis of the *Orange Belt* case and thus recognized the "object" test.[71] Under these decisions if the union's object was primary in nature, clauses securing this object would be valid. Even though cessation of business relationships may result as an incident to the primary activity this is still not enough to establish an unlawful secondary object under section 8(e).[72]

## V. National Woodwork Manufacturers Association v. NLRB—Primary Activity and Work Preservation

Finally the Supreme Court was confronted with the problem of whether or not a work preservation clause was a hot cargo agreement. In *National Woodwork Manufacturers Association v. NLRB*[73] the Manufacturers Association attempted to have these work preservation clauses included in the class of "hot cargo agreements." If this type of agreement is deemed a hot cargo clause then it would naturally be outlawed under section 8(e) of the Landrum-Griffin Act. The case arose in connection with the construction of a Philadelphia housing project. Frouge, the general contractor, had entered into a collective bargaining agreement with the Carpenters' International Union, specifying that Frouge was bound by the rules and regulations in effect between local unions and contractors in areas in which Frouge had jobs. Frouge was therefore subject to the collective bargaining agreement between the union and an organization of Philadelphia contractors known as the General Building Contractors Association, Inc. The agreement provided that "no member of the District Council will handle . . . any doors . . . which have been fitted prior to being furnished on the job . . . ."[74] Frouge contracted for the purchase of premachined doors from a manufacturer who was a member of the National Woodwork Manufacturers Association. When the doors arrived at the

[68] 143 N.L.R.B. at 1221.
[69] 335 F.2d at 714.
[70] *Id.*
[71] *See* Beins, *supra* note 63.
[72] *Id.*
[73] 386 U.S. 612 (1967).
[74] The text of the relevant part of the agreement was as follows:

> No employee shall work on any job on which cabinet work, fixtures, mill work, sash doors, trim or other detailed millwork is used unless the same is union made and bears the union label of the United Brotherhood of Carpenters and Joiners of America. No member of this district council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter places or hardware of any description nor any doors or transoms which have been fitted prior to being furnished on the job including base, chair, rail, picture moulding which has been previously fitted. This section to exempt partition work furnished in sections.

The first sentence of this rule was held by the Board to violate § 8(e) and the Union did not seek judicial review of this holding. 386 U.S. 612, 615 (1967).

job site, the union ordered its carpenters not to hang the doors. Frouge then withdrew the prefabricated doors and replaced them with "blank" doors which were hung by the carpenters after being fitted and cut. The National Woodwork Manufacturers Association filed charges with the National Labor Relations Board against the union claiming that by including the "will not handle" sentence in the contract the union had committed the unfair labor practice proscribed by section 8(e) of entering into an "agreement . . . whereby . . . the . . . employer . . . agrees to cease or refrain from handling . . . any of the products of any other employer . . ."[75] and also that the union had committed the unfair labor practice under section 8(b)(4)(B) of forcing or requiring any person "to cease using . . . the products of any other . . . manufacturer."[76] The charges against the union were dismissed by the National Labor Relations Board.[77] The Board adopted the trial examiner's finding that the "will not handle" sentence in the agreement was to "protect and preserve cutting out and fitting as unit work to be performed by the jobsite carpenters."[78] The Board also adopted the trial examiner's finding that the agreement and its enforcement against Frouge constituted primary activity outside the sections 8(e) and 8(b)(4)(B) prohibitions.[79] The Court of Appeals for the Seventh Circuit reversed the Board and held that the agreement violated section 8(e).[80] The Supreme Court granted certiorari[81] and reversed the Seventh Circuit's decision on section 8(e).[82]

The Supreme Court held that the union did not violate the hot cargo provisions of section 8(e) of the NLRA by including in their contract the provision that no union member will handle any doors fitted prior to being furnished on the job. The Court also held that the secondary boycott provisions of section 8(b)(4)(B) were not violated by the union's instructions to the carpenters to refrain from installing the doors. The contract provision was viewed by the Court as a valid work preservation clause and the union enforcement of this clause was considered as being instituted to maintain the traditional jobsite work of the boycotting carpenters in relation to their own employer. The activities of the union were held not to be done in order to secure benefits for others than the boycotting employees or to gain union objectives in regard to neutral employers.[83] In reaching its decision the Court reviewed the history of labor legislation with particular emphasis on the Taft-Hartley Act and the Landrum-Griffin Act and concluded that Congress intended for sections 8(e) and 8(b)(4)(B) to prohibit only secondary objectives.[84]

The Court in *National Woodwork Manufacturers Association* relied on

---

[75] 386 U.S. at 615.
[76] *Id.*
[77] Carpenters Union (National Woodwork Mfrs. Ass'n), 149 N.L.R.B. 646 (1964).
[78] 386 U.S. at 615.
[79] *Id.*
[80] 354 F.2d 594, 599 (7th Cir. 1965).
[81] 384 U.S. 968 (1966).
[82] 386 U.S. at 616.
[83] *Id.* at 619.
[84] *Id.*

*Allen Bradley Co. v. Local 3, Electrical Workers*[85] as support for the proposition that the "will not handle" sentence was a violation of sections 8(e) and 8(b)(4)(B). *Allen Bradley*[86] concerned a combination between unions and electrical contractors in New York City in an attempt to monopolize the work of that area. In distinguishing the *National Woodwork* from the *Allen Bradley* case the court stated:

> [T]he boycott in Allen Bradley was carried on not as a shield to preserve the jobs of Local 3 members, traditionally a primary labor activity, but as a sword, to reach out and monopolize all the manufacturing job tasks for Local 3 members. It is arguable that Congress may have viewed the use of the boycott as a sword as different from labor's traditional concerns with wages, hours, and working conditions. But the boycott in the present case was not used as a sword; it was a shield carried solely to preserve the members' jobs. We, therefore, have no occasion today to decide the questions which might arise where the workers carry on a boycott to reach out to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product.[87]

Thus, the distinguishing element is the object of the activity. If the activity is carried on for its effect outside of the immediate employer's area, it is prohibited. But the traditional primary activity is still lawful even though it may have some effects on secondary employers.

The Court in *National Woodwork* then went on to a consideration of whether section 8(e) of the Landrum-Griffin Act as enacted by Congress made an agreement such as that between the union and the Philadelphia Contractors Association in itself unlawful. The legislative history of section 8(e) was interpreted to mean that the section did not prohibit agreements made for the preservation of work. The Court stated:

> [A]lthough the language of 8(e) is sweeping, it closely tracks that of 8(b)(4)(A), and just as the latter and its successor 8(b)(4)(B) did not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, 8(e) does not prohibit agreements made and maintained for that purpose.[88]

In conclusion the Court looked at the "will not handle" sentence of the agreement in order to determine if this was a violation of sections 8(e) and 8(b)(4)(B). The Court held that the objective of the sentence was "preservation of work traditionally performed by the jobsite carpenters" and did not amount to a violation of either of the provisions. The union had refused to hang prefabricated doors regardless of whether they bore a union label and had even refused to install prefabricated doors that had been manufactured off the job site by members of the union. This and

[85] 325 U.S. 797 (1944).

[86] The *Allen Bradley* case involved a situation where a union combined with electrical contractors and manufacturers of electrical fixtures in New York for the purpose of restraining the introduction of such equipment from areas outside of the city. The contractors were to limit their purchases to local manufacturers only and these manufacturers limited their New York City sales to contractors employing members of the union. The plan was enforced through the threat of a boycott by the contractors' employees. The Supreme Court held that this activity was a violation of § 8(b)(4) as an attempt to "abet contractors and manufacturers to create a monopoly."

[87] 386 U.S. at 618, 619.

[88] *Id.* at 620.

other evidence[89] substantiated the Court's holding[90] that the "object" of the conduct on the Frouge job site was only to preserve the traditional work of the jobsite carpenters.[91]

The question arises as to whether the construction industry exemption in section 8(e) could have been applied to the agreement invoked in *National Woodwork*. The work involved could have been performed at the job site. Therefore under the liberal interpretation of the exemption the argument could be made that the agreement came under the construction industry exemption. Under the stricter interpretation recognized by the Board the exemption would not apply because the work was not actually done at the job site. Although this issue was clearly present in the *National Woodwork* case the Court did not find it necessary to decide the question. Since the purpose of the agreement was found by the Court to be the retention of work within the bargaining unit, it was classed as a work preservation clause. There was no dispute with an unfair employer or any desire by the union to exert secondary pressure. The objectives of the agreement were found to be primary and as a result section 8(e) was not applied; hence it was unnecessary for the Court to consider the problem of whether the agreement could also be protected by the construction industry exemption.[92]

## VI. Conclusion

Over the past twenty years hot cargo agreements have gradually fallen out of favor with Congress and the courts. The ruling in *Conway's Express* that a hot cargo clause was a valid defense to a secondary boycott charge marks the high point for proponents of the hot cargo agreement. Most of the developments after *Conway* were downhill for the clause.

The main objection that Congress and the courts seem to have to these agreements is their deleterious effect on the economy by restraining the free flow of goods and their involuntary inclusion of neutral employers.[93] While at first glance *National Woodwork* may appear to set forth a reasonable exception, the argument that the clause in *National Woodwork* actually does transgress the words of the statute can be made with force. Under the statute a boycott is unlawful when an object thereof "is forcing or requiring any person to cease using . . . the products of any other manufacturer."[94] An agreement whereby an employer "agrees to cease or refrain from handling . . . any of the products of any other employer is

[89] *Id.* at 649.

[90] In a dissent, Justice Stewart joined by three other Justices voiced the opinion that legislative history confirms the plain meaning of the statute and points out that the union produced boycott and the agreement authorizing it were unfair labor practices. Stewart felt that the majority was substituting "its own notions of sound labor policy for the word of Congress." 386 U.S. at 650.

[91] In a companion case to *National Woodwork*, Houston Insulation Contractors v. NLRB, 386 U.S. 664 (1967), the Supreme Court held similar primary activity protected under the same reasoning set forth in *National Woodwork*.

[92] 29 U.S.C. § 158(e) (1964).

[93] *See* Comment, *Subcontracting Clauses and Section 8(e) of the National Labor Relations Act*, 62 MICH. L. REV. 1176, 1177 (1964).

[94] 29 U.S.C. § 158(b)(4)(B) (1964).

also unlawful." The express words of the statute clearly prohibit the activity disputed in *National Woodwork*. Even though the union's purpose was the preservation of work through primary activity, a result of this activity was a boycott which forced an employer to cease using the products of a certain manufacturer. It cannot be said that work preservation boycotts do not interfere with the free flow of goods, for they do.[95] These boycotts may be permanent in character and "the restraint on the free flow of goods in commerce is direct and pervasive, not limited to goods manufactured by a particular employer with whom the union has a dispute."[96]

On the other hand, it is clear that to take away from workers the weapon which affords protection against the employer's efforts to abolish their jobs would be a harsh remedy in this age of automation. To so hold there must be substantial legislative materials in the form of debates and data along with the actual legislation indicating such a purpose. Unfortunately, there is very little in the congressional records on sections 8(b)(4) and 8(e) which relate to this question. As the Court stated "The silence regarding such matters in the Eighty-sixth Congress is itself evidence that Congress, in enacting section 8(e), had no thought of prohibiting agreements directed to work preservation."[97]

Therefore, in light of this fact, it appears that the majority's ruling is proper since the Court should not outlaw such activity until Congress has clearly indicated that it desires to completely eliminate this method of employee protection.

In determining the boundary lines for hot cargo agreements in the future it is accurate to say that they are outlawed by section 8(e) of the Landrum-Griffin Act with certain exceptions, namely the construction and garment industry exemptions expressed in the proviso to section 8(e) and valid work preservation clauses with primary objectives as set out in the *National Woodwork* case. Work preservation clauses will be allowed as long as their purpose is to retain work for the union members and there are no secondary objectives. Unless Congress sees fit to do away with this exception by legislation, the *National Woodwork* doctrine will allow considerable union activity in this area with results not only in the realm of work preservation, but also with the additional effect of depriving some secondary employers of business due to the protected work preservation clauses.

[95] *See* Comment, *supra* note 93.
[96] 386 U.S. 660, 661 (1967).
[97] *See* J. Harlan's opinion at 386 U.S. 612, 648 (1967).